Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2019-232

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Bell Canada – Elimination of the *ex ante* price floor test for retail tariffs

*The Commission **denies** Bell Canada's application requesting the elimination of the* ex ante *price floor test for all incumbent local exchange carrier retail service tariffs and its replacement with a two-stage,* ex post *review.*

Application

1. On 10 October 2018, Bell Canada filed a Part 1 application proposing that the requirement for an *ex ante* price floor test be eliminated for all incumbent local exchange carrier (ILEC) retail service tariffs. Specifically, Bell Canada requested that the Commission

    - eliminate the requirement for ILECs to file price floor tests prior to the approval of a new retail service or of a rate reduction for an existing retail service;

    - evaluate allegedly anti-competitive pricing complaints on an *ex post* basis (i.e after it has approved the new retail service or the rate reduction); and

    - limit its competition law analysis of such complaints to cases where the allegedly anti-competitive price is below the price floor threshold.

2. Bell Canada noted that if an anti-competitive pricing complaint were well founded and an ILEC had engaged in anti-competitive pricing, the Commission would have the power to impose administrative monetary penalties (AMPs) if it deemed it appropriate to do so.

3. The Commission received interventions from the Canadian Network Operators Consortium Inc. (CNOC), SSi Micro Ltd. (SSi), and UPTele Inc. (UpTélé).

Background

4. In Telecom Decision 94-13, the Commission established the retail price floor test (previously referred to as the "imputation test") as a safeguard to ensure that retail tariff applications made by ILECs for long distance services were not anti-competitive as a result of being offered below cost. The price floor mechanism set out in that decision required that, when proposing a new service or a rate reduction for an

existing service, an ILEC would have to demonstrate that, in general, the proposed rate for the service would be sufficient to recover the costs of the service. Those costs were defined as the Phase II costs of the service plus an imputed contribution amount or cost.[1]

5. In Telecom Decision 97-8, the Commission extended the price floor test to ILECs' retail local exchange services. Accordingly, a price floor test is required when an ILEC files a retail tariff application for a new service or for a rate reduction for an existing service. The price floor test is intended to establish a minimum price threshold to ensure that potential new competitors are able to establish sustainable competition in regulated markets. Competitors wishing to enter or expand their presence in a certain market require certainty that ILECs, despite their potential market dominance, will be prevented from behaving in an anti-competitive way by offering services at rates that are unjust and unreasonable.

6. Over the years, the Commission granted ILECs pricing flexibility for some retail services, such as certain service bundles, short-term promotions, and market trials, allowing them to offer certain services at rates below cost. Moreover, in Telecom Regulatory Policy 2009-80, the Commission determined that the price floor test is not required for a retail service that is expected to have 10 or fewer customers and monthly revenues of less than $10,000.

7. While the price floor test was reviewed and modified on an ongoing basis in subsequent decisions, orders, and directives to reflect changes in other regulatory frameworks, the issue of whether ILECs should still be required to file price floor tests as part of their retail tariff applications for new services or for rate reductions for existing services was last examined in Telecom Regulatory Policy 2009-80. In that decision, the Commission determined that requiring a price floor test on an *ex ante* basis (i.e. before a new retail service or the rate reduction of an existing service is approved) remained appropriate and necessary in light of the Policy Direction.[2] Therefore, for regulated services, an ILEC cannot offer customers the proposed rate until the Commission has (i) found that the price floor test has been satisfied and (ii) approved the related tariff.

Should the Commission eliminate the requirement for ILECs to file an *ex ante* price floor test and replace it with another type of safeguard, such as an *ex post* review?

Positions of parties

8. Bell Canada submitted that since Telecom Regulatory Policy 2009-80, any justifications for filing a price floor test as part of retail tariff applications for new

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[1] Phase II costs are generated using a long-run incremental costing methodology that estimates the cost of serving an additional increment of demand for a particular service.

[2] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, Order in Council P.C. 2006-1534, 14 December 2006

services or for rate reductions for existing services have disappeared. It argued that while the price floor test prevents prices from falling below a predetermined level, it does not ensure that rates are just and reasonable, nor does it prevent situations in which different customers pay different prices for the same service.

9. Bell Canada acknowledged that the test can guard against anti-competitive pricing but argued that anti-competitive pricing is even less likely to occur in the telecommunications industry today than in 2009, because very few retail services are still regulated and local wireline voice retail services are now largely forborne. According to Bell Canada, the test is therefore stricter than necessary, resulting in certain pro-competitive pricing initiatives not being allowed. For example, Bell Canada cited Telecom Order 2016-304, in which the Commission denied Bell Canada's application to reduce a non-recurring service connection charge, even if the lower rate were applied uniformly across the province.

10. Bell Canada also submitted that the price floor test no longer complies with the Policy Direction, as it does not rely on market forces to the maximum extent feasible, does not constitute efficient and minimally intrusive regulation, and is not consistent with streamlined regulation.

11. Bell Canada indicated that a reasonable regulatory approach should allow for the possibility that, in some cases, prices would fall below cost. It also claimed that the risk of predation in the Canadian telecommunications sector is non-existent, arguing that an ILEC would face significant difficulties in trying to induce the exit of a competitor from the market through predatory pricing, as well as having difficulties in recovering any associated lost profits.

12. Instead of systematically requiring ILECs to file a price floor test as part of any requisite tariff filings, Bell Canada proposed that the Commission adopt a new approach. In the event that the Commission were to receive a complaint regarding the alleged anti-competitive nature of an ILEC's pricing behaviour, either during the tariff application proceeding or after the tariff has been approved, Bell Canada proposed that the Commission adopt a two-stage process that would include the following steps:

    - In the first stage, the Commission would examine the complaint to determine whether there was any merit to it on its face. If it found that there was some merit, the Commission would request a price floor test (pursuant to the existing methodology) for the retail service in question. The complaint would warrant further inquiry only if the disputed price was below cost.

- In the second stage, which would be triggered only if the price was below cost, the Commission would conduct a full analysis of the alleged predatory pricing, pursuant to competition law principles.[3]

- Should the Commission conclude, after its two-stage review, that predatory pricing was indeed present, it could impose AMPs, if it deemed it appropriate to do so.

13. Bell Canada noted that under its proposal, the Commission could continue to ask for costing information for new services in order to assess the reasonableness of the proposed retail rates. However, Bell Canada suggested that other information, such as the prevailing price in forborne markets or of an equivalent service provided by competitors, may be a suitable proxy for costing information in the assessment of the just and reasonable nature of the proposed retail tariffed rate. While the Commission could decide on a case-by-case basis whether a price floor test were required, there would be no requirement for such a test to be done as part of the initial filing.

14. As for price reductions for existing retail services, Bell Canada submitted that since the Commission would have already approved a price ceiling, proposed reductions should raise no issue, as they would ultimately benefit consumers.

15. CNOC indicated that the relief sought by Bell Canada would apply only to tariffed retail services, which are declining in number. For this reason, CNOC took no position on the outcome of Bell Canada's application.

16. Nevertheless, CNOC was concerned with the broad arguments that Bell Canada made regarding predatory pricing. CNOC noted that if the Commission decided to approve Bell Canada's application, it should keep its pronouncements regarding the issue of predatory pricing narrowly limited to the services and facts before it.

17. SSi opposed Bell Canada's application on various grounds, including

    - that the risk of predatory pricing by ILECs remains high, and removing the price floor test could favour ILECs' dominance and prevent potential competitive entries into the market; and

    - that AMPs following a competition review are an inadequate response given the ongoing risk of anti-competitive pricing by ILECs, as the advantage of eliminating or preventing competition in a market is likely to outweigh the relatively small AMPs that the Commission is empowered to impose.

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[3] Bell Canada alleged that the review of predatory pricing complaints should not hinge solely on the relationship between the allegedly low price and some measure of the supplier's cost, but that an examination of all the circumstances surrounding the pricing behaviour should be required. It also argued that there may be legitimate reasons for a firm to price below cost (e.g. selling excess or obsolete products, enticing customers to try a new product, matching a competitor's price reduction, or responding to entrants using new technologies with significantly lower costs).

18. UpTélé argued that the Commission should maintain the current price floor test in order to limit predatory pricing practices by ILECs.

19. In addition, UpTélé indicated that a competition review process, as proposed by Bell Canada, would result in ILECs being able to inflict irreparable damage to their competitors due to the unavoidable delays in a complaint-based system. UpTélé argued that in such a situation, the burden of the process would shift to smaller service providers with limited resources.

20. With respect to SSi's argument that a competition review process resulting in AMPs is an inadequate response to anti-competitive pricing, Bell Canada noted that the Commission indicated in Telecom Regulatory Policy 2009-80 that applying the price floor test on an *ex post* basis could be appropriate if it had the statutory authority to impose meaningful AMPs. The Commission was granted such authority under the *Telecommunications Act* (the Act) in 2014. Bell Canada noted that the Commission can levy corporate AMPs of up to $10 million per contravention and up to $15 million for each subsequent contravention, which it deemed a sufficient deterrent.

Commission's analysis and determinations

21. Pursuant to subsection 27(1) of the Act, the Commission must ensure that every regulated rate charged by a Canadian carrier for a telecommunications service is just and reasonable. As the Commission noted in Telecom Regulatory Policy 2009-80, the minimum price threshold established by the price floor test helps ensure that rates are just and reasonable and are not unjustly discriminatory, as well as providing protection against anti-competitive pricing. It does so by ensuring that services are not provided below cost.

22. The price floor test, which provides a summary of costs, applies only to regulated retail services, meaning services offered in regulated markets where either there is no competition, or competition has not yet sufficiently developed for market forces to be sufficient to protect the interests of users. Moreover, even within regulated markets, ILECs have a degree of pricing flexibility. For example, the Commission has granted rate de-averaging for services in regulated exchanges to allow for pro-competitive pricing initiatives.[4]

23. Just and reasonable rates benefit end-users and are especially important for customers of regulated services, who are more vulnerable to unreasonable pricing practices by a dominant or sole service provider due to the lack of sufficient competition. A key purpose of the price floor test is to allow sustainable competition to gain a foothold in regulated markets. A lack of safeguards against ILECs providing services below cost could deter the entry or expansion of a competitor. Competitors wishing to enter or expand their presence in a certain market need the certainty that ILECs, despite their potential market dominance, will be prevented from behaving in anti-competitive

[4] Rate de-averaging permits an ILEC to price the same regulated service differently within an exchange (i.e. at the subscriber level).

ways and will offer services at rates that are just and reasonable, and not unjustly discriminatory.

24. Even if the price floor test were eliminated, it would have to be replaced with some other mechanism to ensure that proposed rates are just and reasonable, and not unjustly discriminatory, at the time an ILEC files a tariff application. Absent any costing information, any finding of just and reasonable rates would be largely unsubstantiated. While other information may be available, such as the prevailing rate in forborne markets or the rate for an equivalent service provided by competitors, its applicability may be limited given the underlying cost differences (e.g. in regulated versus forborne exchanges). Further, the assessment of such information would not necessarily be more effective or efficient than the current practice.

25. The Commission considers that implementing Bell Canada's proposal to replace the price floor test with a multi-phase process would result in a regime that would be less effective and efficient than the current price floor test.

26. A key issue with the proposed process involves the reliance on complaints. In markets where the price floor test applies, competition is either minimal or non-existent, so there is little likelihood that a competitor will make a complaint. Existing or would-be competitors would have to expend resources to exercise additional oversight of the ILECs' tariffs, which would place most of the burden of the process on smaller service providers with limited resources.

27. The Commission indicated in Telecom Regulatory Policy 2009-80 that it would be prepared, in principle, to apply the price floor test on an *ex post* basis if it had the statutory authority to impose meaningful AMPs for non-compliance. It has had such authority since 2014. However, the few cases in which the Commission has imposed AMPs under the Act have demonstrated that the process takes time.[5] Even if only a few months elapse between the beginning of an ILEC's anti-competitive behaviour and the issuance of an AMP, irreparable damage could be done to a new competitor. The Commission considers that Bell Canada's proposed complaint-based system does not allow for a quick final resolution, which is desirable since the target of an ILEC's anti-competitive behaviour may be a smaller, or less well-known, new service provider trying to establish sustainable competition.

28. With regard to Bell Canada's suggestion that the price floor test imposes an excessive burden on ILECs, the Commission considers that the company has failed to provide evidence in support of this claim, or against the current price floor test's effectiveness and efficiency. The Commission remains of the view that the price floor test is an effective and efficient regulatory tool that is standardized, understood by the industry, and based on available data.

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[5] For example, see Telecom Decision 2017-115 and Telecom Order 2017-116.

29. In view of the above, the Commission considers that the price floor test is a tool that is necessary to fulfilling its legislative requirement to ensure that every regulated rate is just and reasonable.

30. The Commission also notes that the associated costing information provided as part of the price floor test allows the Commission to assess the reasonableness of ILECs' mark-ups and, if necessary, adjust rates in order to ensure that they are just and reasonable.

31. Moreover, while the number of regulated services is small and will likely continue to decrease over time, the Commission notes that consumers who use these services require safeguards in the absence of competition and market forces. Therefore, an after-the-fact approach to addressing anti-competitive behaviours is not an adequate mechanism to protect vulnerable consumers or to support service providers that are trying to establish sustainable competition in these markets.

32. Finally, the Commission notes that in Telecom Regulatory Policy 2009-80, it considered that the original price floor test was compliant with the Policy Direction. Nothing indicates that this is no longer the case. The Commission considers the price floor test to be an efficient and proportionate means of protecting the interests of end-users by ensuring that rates are just and reasonable. Further, requiring the filing of a price floor test for retail service tariffs is minimally intrusive and onerous.

33. Accordingly, the Commission **denies** Bell Canada's Part 1 application requesting the elimination of the *ex ante* price floor test for retail service tariffs.

Secretary General

Related documents

- *VOIS Inc. – Non-compliance with the requirement to participate in the Commissioner for Complaints for Telecommunications Services Inc. and violation under section 72.001 of the* Telecommunications Act, Telecom Decision CRTC 2017-115 and Telecom Order CRTC 2017-116, 27 April 2017

- *Bell Canada – Application to modify the residential Service Connection charge*, Telecom Order CRTC 2016-304, 1 August 2016

- *Review of the price floor test and certain wholesale costing methodologies*, Telecom Regulatory Policy CRTC 2009-80, 19 February 2009

- *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997

- *Review of regulatory framework – Targeted pricing, anti-competitive pricing and imputation test for telephone company toll filings*, Telecom Decision CRTC 94-13, 13 July 1994